SERVED: July 19, 2007

NTSB Order No. EA-5299

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of July, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. ROBERT C. KONOP, Respondent.	)	Docket SE-17422

OPINION AND ORDER

Respondent and the Administrator have both appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty,[1] issued in this proceeding on April 13, 2006. The Administrator's order suspended respondent's airline transport

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

pilot certificate for 45 days, based on an alleged violation of 14 C.F.R. § 121.548.[2] The law judge found that respondent violated § 121.548, but modified the sanction, reducing the suspension of respondent's certificate from 45 days to 30 days. We deny respondent's appeal and grant the Administrator's appeal.

Background

The Administrator's May 24, 2005 order was filed as the complaint against respondent, and alleges that on or about December 1, 2004, respondent was the pilot-in-command (PIC) of Hawaiian Airlines Flight 19, from Sacramento, California, to Honolulu, Hawaii. The order further alleges that FAA Aviation Safety Inspector Eden M. Spurlin, authorized under 49 U.S.C. § 40113 to perform inspections, and while in the performance of her official duties under those provisions, presented her FAA Form 110A credentials to respondent. He refused to allow the

[2] Title 14 C.F.R. § 121.548 provides:

> Whenever, in performing the duties of conducting an inspection, an inspector of the Federal Aviation Administration presents Form FAA 110A, "Aviation Safety Inspector's Credential," to the pilot in command of an aircraft operated by a certificate holder, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft.

inspector to fly on the aircraft and ordered her to remove herself from the flight.

The law judge held an evidentiary hearing on April 13, 2006, at which the Administrator presented the testimony of a Hawaiian Airlines station manager (Ms. Francine Cabanilla), a Hawaiian Airlines flight attendant (Mr. Joseph Hewett), and Inspector Eden Spurlin. Although respondent has had a non-lawyer representative both before and after the hearing, and on pleadings, his representative was not present at the hearing. Respondent presented his own case and testified.

Facts

Inspector Spurlin was an aviation safety inspector assigned to the Honolulu Flight Standards District Office as an assistant principal maintenance inspector. Tr. at 61, 62. On December 1, 2004, she was returning to Honolulu, Hawaii, after inspecting the line station at Sacramento, California. Inspector Spurlin was scheduled to conduct a flight deck en route inspection for Flight 19 (Tr. at 62-63), but respondent directed her to remove herself from the flight before passenger boarding. Tr. at 69, 98, 129.

The parties dispute some of the facts and circumstances surrounding the alleged violation. We have reviewed the record and agree with the law judge’s factual determinations.

Specifically, we find that, at the gate at the Sacramento Airport, on December 1, 2004, Inspector Spurlin presented the station manager with her credentials and an FAA Form 8430-13, requesting a flight from Sacramento to Honolulu. Tr. at 178-79. The station manager asked the inspector to fill out the Hawaiian Airlines form for cockpit authorization and Inspector Spurlin complied. The station manager allowed Inspector Spurlin to enter the jetway about the same time as respondent. Tr. at 179, 185. Inspector Spurlin saw respondent enter the aircraft and turn to the left, put his bag down, and stand with his back to her. Tr. at 186. Respondent appeared to be busy, so the inspector identified herself to the flight attendants, who observed her badge; the inspector then began a cabin inspection. Tr. at 179, 184, 185, 187.

When respondent had not acknowledged her, Inspector Spurlin put her FAA credentials "under his nose" and told him who she was and what she was doing; respondent "only nodded." Tr. at 186-187. After further unsuccessful attempts to engage him in conversation, Inspector Spurlin told respondent that she was going to do a cabin inspection. Tr. at 187. A short time later, respondent met Inspector Spurlin in the cabin and told her that he was removing her from the flight—that she was a security and safety risk. Id. The inspector told respondent

that he could be in violation of the Federal Aviation Regulations. Tr. at 187.

At the hearing, respondent testified that he believed Inspector Spurlin presented a security risk. Tr. at 188. He testified that he went so far as to get the crash ax in the cockpit, thinking he might have to defend the aircraft. Id. The law judge discredited respondent's testimony. Tr. at 189.

Respondent's Appeal

Respondent presents an appeal brief with seven "Reasons for Grant of Appeal." His arguments can be broken down into two types, those based on the merits of the case, and those based on procedural issues.

We interpret respondent's essential argument as consisting of two prongs: (1) Inspector Spurlin did not properly identify herself or her purpose or obtain the proper authorization for flight deck access; and (2) the PIC has the emergency authority to exclude anyone from the cockpit in the interests of safety. Some of his seven "reasons" tend to overlap, but we have distilled his substantive argument down to these two components.

In support of the first prong, respondent belabors the contentions, throughout his brief and at the hearing, that he felt, as the PIC, that Inspector Spurlin failed to properly identify herself to him; that she failed to properly identify

herself to the other crewmembers; that she failed to properly obtain authorization for cockpit access; and that she did not announce a proper purpose for traveling with the flight crew in the cockpit. Respondent's brief sets forth his position exhaustively, and it will not be repeated here. Also, the Administrator clearly presents her position; succinctly stated, the Administrator argues that the inspector complied with all requirements to identify herself, clearly stated her purpose as conducting an en route flight deck inspection, and properly requested authorization to fly in the cockpit. The bottom line is that the law judge found that Inspector Spurlin, in the performance of her official duties, properly requested cockpit access, properly identified herself to the crew, and properly announced her purpose for being on the aircraft. As the law judge said at the hearing, the "Brown case is dispositive." Tr. at 35, 37.[3]

In support of the second prong of his argument, respondent avers that he determined Inspector Spurlin presented a safety

[3] Citing Administrator v. Brown, 5 NTSB 553, 554 (1985), which held that 14 C.F.R. § 121.548 contains no requirement that an FAA inspector either announce her purpose for riding in the jumpseat or present a copy of the airline's form authorizing same, but merely requires that the inspector present her credentials. See also Administrator v. Flowers, NTSB Order No. EA-3842 at 2 (1993); Administrator v. Sullivan, 3 NTSB 1292, 1293-94 (1978).

and security risk and that, pursuant to his authority under 14 C.F.R. § 121.547(a)(4), he had the right to exclude her from the aircraft. This portion of respondent's argument is presented primarily as his fourth "reason for grant of appeal." Resp. App. Br. at 23-25. But he incorporates threads of this argument throughout the hearing and his brief. As the Administrator pointed out in her reply brief, the law judge found incredible respondent's contention that an emergency situation warranted his refusal to allow the FAA inspector to conduct an en route inspection. Adm. Reply Br. at 15. We have carefully reviewed the evidence in the record, and agreeing with the law judge's apparent assessment of the reliability of respondent's testimony, see no reason to reject the law judge's determination. Resolution of a credibility determination, unless made in an arbitrary and capricious manner, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

As to respondent's arguments dealing with procedural matters, we address each briefly. He cites FAA Order 8400.10, the "Air Transportation Operations Inspector's Handbook," in furtherance of his argument that Inspector Spurlin failed to comply with guidance regarding cockpit inspections. Resp. App. Br. at 7-11. Even if the specific issue regarding the

inspector's compliance with this particular guidance had any merit, which it does not in light of the law judge's findings in accord with the Brown case (supra, at 6), respondent failed to preserve it for appeal. He did not submit the handbook as evidence; therefore, the issue is not before the Board for our review. See Administrator v. Abou-Sakher, NTSB Order No. EA-4838 (2000).

Respondent raises the procedural matter regarding selection of the hearing location. Resp. App. Br. at 14. Aside from broad statements about due process (id. at 14-20), respondent identifies only one specific potential prejudicial matter that he relates to venue ("the opportunity to access witnesses who would not have otherwise been available," id. at 18). Even then, he fails to identify, either at the hearing or in pleadings, what witness or witnesses were not available, and fails to articulate any way he was harmed by the selection of San Francisco, less than 100 miles from his choice of Sacramento, as the venue. Although he made a motion to change venue to Sacramento, respondent did so only 10 days prior to the hearing, and 60 days after he was notified of the hearing location. See Adm. Reply Br. at 25. The law judge denied respondent's motion to change venue stating that respondent "had ample advance notice of the scheduling of this matter and the

venue designated; therefore, the making of this Motion at this late date is viewed as untimely." Order dated April 5, 2006. The law judge further said that, "the locale selected was with consideration of a major hub and that, as other matters could be and are scheduled to precede the instant case, the venue selected results in conservation of Board/public funds." Id. As prescribed in 49 C.F.R. § 821.37(a), one of the Board's Rules of Practice, the law judge, in setting the place of the hearing, must give "due regard" to the location of the subject incident, the convenience of the parties and their witnesses, and the conservation of Board funds.[4] The law judge's selection of San Francisco as the hearing location did not constitute an abuse of discretion, and we find no error.

Respondent argues that summary judgment in his favor would have been the appropriate disposition of this case, because no issues of fact remain. Resp. App. Br. at 20. Respondent filed a motion for summary judgment on March 14, 2006, and the law judge denied that motion. Respondent renewed his motion at the beginning of the hearing, and the law judge again denied it.[5]

[4] See Administrator v. Bernstein, NTSB Order No. EA-4120 at 9 (1994); Administrator v. Berko, 6 NTSB 1334 (1990); and Administrator v. Carr, 2 NTSB 515, 516-17 (1973).

[5] In Federal courts, generally, denial of a motion for summary judgment is not subject to review after a hearing on the merits.

Beyond the procedural aspect, however, it is clear that material issues of fact remained to be decided in this case. Title 49 C.F.R. § 821.17(d), another of the Board's Rules of Practice, states that a party may file "a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law." We agree with the law judge's conclusion that genuine issues of material fact required review. Therefore, summary judgment in respondent's favor would be inappropriate. See Tr. at 16.

Respondent alleges that the FAA "failed to follow the procedures set forth under law and failed to comply with its own guidance" in instituting the rule that the FAA now claims he violated. Resp. App. Br. at 25. His allegation is that the Administrator did not comply with the Administrative Procedure Act in promulgating 14 C.F.R. § 121.548, in that there was no meaningful prior notice and opportunity for public input, and that his rights to due process were thereby violated.

(..continued)
See, e.g., Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714, 718-20 (7th Cir. 2003); Lind v. United Parcel Service, Inc., 254 F.3d 1281, 1283-86 (11th Cir. 2001). Cf. Ondrusek v. Murphy, 120 P.3d 1053, 1056 (Alaska 2005).

The Administrator states that the FAA's Federal Register notice on January 26, 1996, utilized an exception to the notice and comment requirement provided at 5 U.S.C. § 553(b)(3)(B) of the Administrative Procedure Act (when the agency finds good cause that notice would be "impracticable, unnecessary, or contrary to the public interest," and incorporates the finding and rationale in the rule issued). Adm. Reply Br. at 28-29. The January 26, 1996 notice reflected the FAA's finding that because there was a "need to expedite these changes and because the amendment is editorial in nature and would impose no additional burden on the public," no notice and opportunity for public comment before adopting the amendment was necessary. Adm. Reply Br. at 29, citing 61 FR 2608-01. The Administrator further states that the "FAA was in complete compliance with the requirements of 5 U.S.C. 553(b)[(3)](B)." Adm. Reply Br. at 29. We concur, but we also note that it is "well settled in the law that the Board does not have the authority to review the rulemaking actions of the Administrator of the FAA but is limited to reviewing the Administrator's orders amending, modifying, revoking, or denying certificates." Administrator v. Langley, 3 NTSB 1218, 1219 (1978), citing, e.g., Air Line Pilots Association, International v. Quesada, 276 F.2d 892 (2nd Cir. 1960), cert. denied, 366 U.S. 962 (1961); Doe v. CAB, 356 F.2d

699 (10th Cir. 1966); Watson v. NTSB and FAA, 513 F.2d 1081 (9th Cir. 1975); and Petition of Ewing, 1 NTSB 1192 (1971). See also Administrator v. Dilley, NTSB Order No. EA-3945 (1993).

Finally, respondent challenges his sanction, saying that, "under the FAA's own standards the penalty of suspension is inappropriate for non-safety related violations." Resp. App. Br. at 31. He cites 14 C.F.R. § 13.11 for the proposition that, "alleged violations which are not related to any issue of airman qualification, or where an alleged violation is not related to safety of flight, the FAA's own standards call for the issue of any alleged violation to be handled 'administratively'." Id. Section 13.11 does not stand for this proposition. Section 13.11(a) states, in pertinent part, "If it is determined that a violation or an alleged violation ... does not require legal enforcement action, an appropriate official of the FAA field office responsible for processing the enforcement case ... may take administrative action in disposition of the case." As the Administrator states, "Clearly, the FAA officials who reviewed this case believed legal enforcement action was appropriate," citing Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987). Adm. Reply Br. at 20. This is long-standing Board precedent. We do not have the jurisdiction to review the Administrator's prosecutorial discretion.

Administrator's Appeal

The Administrator appeals the law judge's reduction of the sanction, and respondent opposes the Administrator's appeal. The law judge, in reducing the suspension from 45 to 30 days stated that, "deference is to be shown to the choice of sanction ... unless that choice is shown to be either arbitrary, capricious or not in accordance with precedent." Tr. at 192. He said he had "[g]one back through several of the cases pertaining to refusal of access to the flight deck, and it appears ... that the majority of those cases do fall within a range of 20 to 30 days." Id.

The Administrator states that a "review of Board precedent regarding sanction imposed for a sustained violation of Section 121.548 supports the ALJ's contention," and lists seven cases in which sanction was either 15 or 20 days. Adm. App. Br. at 14-15. The Administrator points out, however, that these are all "pre-deference cases," and that the sanction guidance table now identifies a "sanction range of 30 to 60 days." Id. at 15. Respondent argues that, when the Administrator fails to consider precedent and the facts and circumstances surrounding the alleged violation when she initially determines the sanction, the law judge may reduce the sanction. Resp. Reply Br. at 13-

17. Respondent further questions whether "any sanction at all is justified." Id. at 17.

The controlling statute is 49 U.S.C. § 44709(d)(3): "the Board ... is bound by all validly adopted interpretations ... of written agency policy guidance available to the public related to sanctions to be imposed under this section unless arbitrary, capricious, or otherwise not according to law." The law judge did not fully explain his rejection of the Administrator's sanction. He cited no cases, saying only that he had "gone back through several" of them.

The Administrator cited the FAA's Enforcement Sanction Guidance Table in recommending a 45-day suspension of the pilot certificate. Tr. at 17, 168. According to the Sanction Guidance Table, the Administrator could have recommended a suspension of up to 60 days. At the administrative hearing, the Administrator's counsel stated that, "the aggressiveness, the calculation, the premeditation associated with this decision to remove an FAA inspector in the performance of her official duties justifies a mid-range suspension...." Tr. at 168.

Conclusion

The Board finds that safety in air commerce or air transportation and the public interest require the affirmation of the Administrator's order of suspension.

After a review of the law and the circumstances in this case, as well as the aggravating and mitigating factors involved therein, we find the Administrator's original 45-day suspension period appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

3. The 45-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.[6]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[6] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).